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Attorneys for Defendant  
ELIJAH COOPER

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ELIJAH COOPER,

Defendant.

Case No. 13 Cr. 693 SI

NOTICE OF MOTION AND MOTION TO  
DISMISS COUNTS TWO AND THREE OF  
THE SECOND SUPERSEDING  
INDICTMENT; MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT

Date: April 21, 2015

Time: 3:00 p.m.

Before the Honorable Susan Illston  
United States District Judge

TO: MELINDA HAAG, UNITED STATES ATTORNEY, and BENJAMIN TOLKOFF,  
MARC WOLF, and BRIGID MARTIN, ASSISTANT UNITED STATES ATTORNEYS:

PLEASE TAKE NOTICE that, subject to the Court's approval, on April 21, 2015, at 3:00 p.m., or as soon thereafter as he may be heard, defendant Elijah Cooper, by and through his counsel, will and does hereby move this Court for an Order dismissing counts two and three of the second superseding indictment.

**MOTION**

Elijah Cooper moves this Court pursuant to the Due Process clause of the Fifth Amendment, the Speedy Trial Act, and all other applicable case law and statutes for an Order

1 dismissing counts two and three of the second superseding indictment. Mr. Cooper contends that  
2 the absence of “facts regarding what [Mr. Cooper and his alleged co-conspirators] were alleged  
3 to have done” renders count three insufficient and it must be dismissed. Mr. Cooper further  
4 contends that the grand jury returned the second superseding indictment out of time, and as a  
5 result, the two new charges—counts two and three—should be dismissed pursuant to the Speedy  
6 Trial Act.

7 This motion is based on the instant notice of motion and motion, the Court’s July 31 and  
8 November 12, 2014 Orders addressing pretrial motions, *see* ECF Nos. 65 & 87, the attached  
9 memorandum of points and authorities, the documents on file in the Clerk’s Record, and any and  
10 all other materials that may come to this Court’s attention at the time of the hearing on this  
11 motion.

12 Respectfully submitted,

13 DATED: April 10, 2015

COLEMAN, BALOGH & SCOTT LLP

14  
15 */s/ E A Balogh*  
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18 Attorneys for Defendant  
19 ELIJAH COOPER  
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# MEMORANDUM OF POINTS AND AUTHORITIES

## I. Background

On Tuesday, April 7, 2015, the Government returned a second superseding indictment against defendant Elijah Cooper. ECF No. 126. Whereas the first two indictments charged Mr. Cooper with two counts—distributing crack cocaine on February 5, 2013, and with conspiring with unnamed persons to distribute crack cocaine, *see* ECF Nos. 1 & 67, the new indictment also alleges as count two a violation of 21 U.S.C. § 843(b), *viz.*, the use of a communication facility to commit a controlled substance offense (aka, a “phone count”).

The grand jury returned the second superseding indictment in response to this Court’s prior Orders dismissing count two—the conspiracy count—in response to Mr. Cooper’s motions to dismiss. *See* ECF Nos. 65 & 87.

As pleaded in the initial indictment, count two alleged as follows:

COUNT TWO: (21 U.S.C. § 846 - Conspiracy to Distribute Cocaine Base)

2. Beginning on an unknown date but no later than February 4, 2013, and continuing until at least on or about May 29, 2013, in the Northern District of California, the defendant, ELIJAH COOPER, knowingly and intentionally combined, conspired, confederated and agreed with other persons known and unknown to the Grand Jury, to commit the following offense against the United States: to distribute 28 grams or more of a mixture and substance containing cocaine base, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(iii), all in violation of Title 21 United States Code, Section 846.

ECF No. 1.

As pleaded in the first superseding indictment, count two alleged:

COUNT TWO: (21 U.S.C. § 846- Conspiracy to Distribute Cocaine Base)

2. From on or about February 4, 2013, and continuing until on or about May 29, 2013, in the Northern District of California, the defendant, ELIJAH COOPER, knowingly and intentionally combined, conspired, conspired [sic], confederated and agreed with other persons known and unknown to the Grand Jury to commit the following offense against the United States: to distribute twenty-eight grams and more of a mixture and substance containing cocaine base, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(iii), all in violation of Title 21, United States Code, Section 846.

ECF No. 67.

When the Court dismissed the conspiracy count for the second time, the Government noticed an appeal. ECF No. 94. The Government neither sought a stay of these proceedings nor expedited briefing, and the Court of Appeals directed the Government to file its opening brief on March 11, 2015. *United States v. Cooper*, USCA Case No. 14-10542, Dkt. 1-1. On the date that brief came due, the Government abandoned its appeal and filed a motion to dismiss it. *Id.*, Dkt. 5. The Ninth Circuit granted that motion and dismissed the Government's appeal. *Id.*, Dkt. 6.

On April 7, the Government secured a second superseding indictment in which it added a phone count and again alleged a conspiracy count, now as count three, as follows:

COUNT THREE: (21 U.S.C. § 846- Conspiracy to Possess with Intent to Distribute and Distribute Cocaine Base)

3. The allegations contained in Counts One and Two of this Indictment [sic] are realleged and incorporated as if fully set forth here.

4. From on or about February 4, 2013, and continuing until on or about March 18, 2013, in the Northern District of California, the defendant, ELIJAH COOPER, knowingly and intentionally combined, conspired, confederated and agreed with Anthony Knight and other persons known and unknown to the Grand Jury to posses with the intend to distribute, and to distribute, a Schedule II controlled substance, to wit, twenty-eight grams and more of mixtures and substances containing cocaine base, in violation of Title 21, United States Code, Sections 846 and 841(a)(l) and 841(b)(1)(B)(iii).

ECF No. 126. In sum, while the Government named Anthony Knight as Mr. Cooper's alleged co-conspirator, the Government continues to ignore this Court's Orders and this deficiently pleaded count must be dismissed. In addition, the newest indictment was returned out of time under the Speedy Trial Act. Based on the history of this case, counts two and three should be dismissed with prejudice.

## II. Argument

**A. Count Three does not provide sufficient notice as directed by this Court's prior rulings, and it should be dismissed the prejudice.**

Because the Court has now twice sustained Mr. Cooper's challenges to the Government's deficient pleading before, it is well familiar with this issue and Mr. Cooper will rely on the

1 Court's work and findings. Importantly, following the Government's abandoned appeal, the  
 2 Court's ruling is the law of the case and should not be disturbed.

3 As the Court ruled in November:

4 In [July 31, 2014] order, the Court found Count Two of the original  
 5 indictment to be insufficiently plead because it failed to provide "the  
 6 substantial safeguards to criminal defendants that indictments are designed  
 7 to guarantee." *United States v. Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979)  
 8 (per curiam) (citation and internal quotation marks omitted). Specifically,  
 9 the Court found that the indictment failed to provide sufficient detail  
 10 regarding (1) when the conspiracy took place because the time frame was  
 11 essentially open-ended in both directions, (2) the identity of the alleged  
 12 coconspirators, **and (3) facts regarding what they were alleged to have**  
 13 **done.** Docket No. 65 at 6. The government has attempted to cure the first  
 14 of these flaws in the superseding indictment, Docket No. 67 ("From on or  
 15 about February 4, 2013...), cf. Docket No. 1 ("Beginning on an unknown  
 16 date but no later than February 4, 2013..."), but otherwise essentially  
 17 parrots the language of the original indictment. *The government's failure*  
 18 *to cure the second and third flaws renders the indictment devoid of "a*  
 19 *few basic factual allegations [to] accord[] defendant[] adequate notice of*  
 20 *the charges against [him] and assure[] [him] that [his] prosecution will*  
 21 *proceed on the basis of facts presented to the grand jury" as required by*  
 22 *controlling precedent in this Circuit. Cecil* 608 F.2d at 1297. Accordingly,  
 23 the Court GRANTS defendant's motion to dismiss Count Two of the  
 24 superseding indictment.

25 ECF No. 87 at 4:21-5:8 (emphases added).

26 Despite the clarity of the Court's Order, the Government yet again has crafted a  
 27 conspiracy count that omits any "facts regarding what they [the alleged co-conspirators] were  
 28 alleged to have done." *See* ECF No. 126. The Court should enforce its prior rulings and dismiss  
 count three as insufficiently pleaded.

The only remaining question is whether the Court should dismiss count three with  
 prejudice. It should. The Court twice instructed the Government that, to be sufficient, its section  
 846 conspiracy allegation must set forth some "factual allegations" to provide adequate notice  
 and assure that the defendant will be tried *only* on the facts presented to the grand jury. ECF  
 Nos. 65 & 87. In response, the Government filed a notice of appeal, then abandoned the appeal  
 when its brief came due, and now continues to voice its disagreement with the Court's two  
 Orders by refusing to accept and honor them. With Mr. Cooper's long-awaited trial less than one  
 month away (at the time of the hearing of this motion), there is no excuse for the Government's

1 refusal to abide this Court's Orders. Indeed, it may well be that the Government hopes to secure  
 2 the trial continuance it has twice sought by returning a patently deficient indictment aimed at  
 3 generating this motion, and thus requiring Mr. Cooper to abandon his speedy trial demand and  
 4 put off this case (yet again) to litigate the sufficiency of the same deficient conspiracy charge.  
 5 But whatever the reason for the Government's rejection of this Court's Orders, only dismissal  
 6 with prejudice will ensure Government compliance with this Court's rulings and respect for a  
 7 defendant's rights going forward.

8 In addition, with the Government's consent—and with a studied eye to the  
 9 commencement of this trial on May 7, 2015—the Court imposed an April 9, 2015 deadline for  
 10 the Government to return its second superseding indictment. As of the hearing of his motion,  
 11 that time will long have run, and the Government certainly cannot be heard to complain that it  
 12 forfeited its ability to charge Mr. Cooper with conspiracy when it decided to bring that charge in  
 13 studied disregard of the Court's rulings.

14 **B. The Government secured the second superseding indictment too late, and the Court**  
 15 **should either dismiss it in full and require Mr. Cooper to proceed to trial on the first**  
 16 **superseding indictment or dismiss counts two and three—the new counts—and**  
 17 **require Mr. Cooper to proceed to trial on the timely filed distribution count.**

18 The Speedy Trial Act requires the Government to return an indictment within 30 days of  
 19 an individual's arrest or service of a summons. 18 U.S.C. § 3161(b). When:

20 an indictment or an information is dismissed upon motion of the defendant . . .  
 21 and thereafter . . . an information or indictment is filed charging such defendant  
 22 with the same offense or an offense based on the same conduct or arising from the  
 23 same criminal episode [*e.g.*, counts two and three of the second superseding  
 24 indictment,] the provisions of subsections (b) and (c) of this section shall be  
 25 applicable with respect to such subsequent complaint, indictment, or information,  
 26 as the case may be.

27 18 U.S.C. § 3161(d)(1).

28 In this case, the Government had 30 days to re-indict Mr. Cooper following the Court's  
 November 12, 2014 dismissal of count two. The Government noticed its appeal on December  
 10, 2014, ECF No. 94, thus 28 days of the speedy trial clock ran as of that filing. Accepting  
*arguendo* that the “delay resulting from [that] interlocutory appeal” tolled the clock, *see* 18  
 U.S.C. § 3161(h)(1)(C), the Government's dismissal of that appeal and the issuance of the Ninth

1 Circuit's mandate on March 16, 2015, returned that issue to this Court, and the Government had  
2 two days to return a superseding indictment. Rather than proceed promptly, the Government  
3 delayed another 22 days before returning the second superseding indictment. ECF NO. 126.  
4 Because the Government took 50 days to return the superseding indictment on the dismissed  
5 count and to add another count from the same alleged criminal episode, its indictment was filed  
6 out of time and counts two and three should be dismissed with prejudice.

7 While not directly controlling, Mr. Cooper acknowledges that *United States v. Barraza-*  
8 *Lopez*, 659 F.3d 1216 (2011), cuts against his claim. *See id.*, 659 F.3d at 1219-22 (after  
9 recognizing ambiguity in the statute, adopting interpretation that speedy trial clock for charges  
10 dismissed from a complaint is reset upon the filing of the subsequent complaint, indictment, or  
11 information). Importantly, the Court did not address the rule of lenity, *see Ratzlaf v. United*  
12 *States*, 510 U.S. 135 (1994), which requires ambiguous criminal statutes to be resolved in favor  
13 of the accused. Application of that rule here distinguishes *Barraza-Lopez* and supports Mr.  
14 Cooper's claim for relief.

15 And even if *Barraza-Lopez* did control, the Government cannot establish the "good-faith  
16 qualifier" on which it is based. *Barraza-Lopez*, 659 F.3d at 1221-22 & n.7. The Court  
17 recognized that the rule it adopted created "[t]he potential for abuse" and manipulation of the  
18 speedy trial clock by the Government. *Id.* at 1222. As a result, it announced a rule that  
19 "expressly allows district courts to curb abusive behavior or sanction prosecutorial carelessness,"  
20 including by dismissing superseding charges with prejudice. *Id.*

21 The record in this case establishes gamesmanship to avoid this Court's Order and to avoid  
22 providing timely and sufficient notice of the charges against Mr. Cooper. Rather than return a  
23 second superseding indictment upon the Court's second dismissal, the Government gamed the  
24 speedy trial clock by taking an appeal only to abandon it when its brief came due. But even then,  
25 the Government did not return to the grand jury. Instead, only after Mr. Cooper complained to  
26 this Court and identified the likelihood of a superseding indictment on the eve of trial did the  
27 Government return to the grand jury. And, as noted above, when it did, the Government did so  
28 in a way that rejected this Court's prior rulings and returned an indictment bereft of facts. At

1 best, the Government can prove carelessness; at worst, the record supports a finding of abusive  
2 practice. Either finding supports dismissal with prejudice. *Id.* at 1222.

3 **CONCLUSION**

4 For the reasons set forth above, the Court should dismiss the second superseding  
5 indictment with prejudice and should require trial on the first superseding indictment, or should  
6 dismiss counts two and three of the second superseding indictment with prejudice.

7 Respectfully submitted,

8 DATED: April 10, 2015

COLEMAN, BALOGH & SCOTT LLP

9 */s/ E A Balogh*

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**PROOF OF SERVICE**

I, Ethan A. Balogh, certify that on April 10, 2015, I served all parties in this matter by causing the preceding pleading to be filed electronically, as set forth by Local Rule 5-1.

Dated: April 10, 2015

*/s/ E A Balogh*  
ETHAN A. BALOGH